IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 29, 2008 Session

STATE OF TENNESSEE v. APRIL JENKINS

Appeal from the Criminal Court for Greene County
No. 06CR194 John R. Dugger, Jr., Judge

No. E2007-02519-CCA-R3-CD - Filed January 21, 2009

Appellant, April Denise Jenkins, was indicted by the Greene County Grand Jury for two counts of aggravated assault and one count of burglary. After a jury trial, Appellant was convicted of assault as a lesser included offense of aggravated assault. Appellant was found not guilty of burglary and not guilty of one count of aggravated assault. Appellant was sentenced to eleven months and twenty-nine days in incarceration. The trial court ordered Appellant's sentence to be served at a 50% release eligibility. On appeal, Appellant argues that the evidence was insufficient to support the conviction for assault, the trial court committed plain error by failing to charge the jury with the "new self-defense statute," and the trial court erred by sentencing Appellant "to a 50% release eligibility date." Therefore, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and D. KELLY THOMAS, JR., joined.

Francis X. Santore, Jr., Greenville, Tennessee, for the appellant, April Jenkins.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; C. Berkeley Bell, District Attorney General and J. Chalmers Thompson and Alex Pearson, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

On the evening of January 20, 2006, Appellant and her friend, George Michael Calhoun, went to the Starburst Club in Greene County, Tennessee. Deborah Silvers was working as a bartender that night. When Ms. Silvers arrived at work, she parked her car directly in front of the glass doors to the club.

Sara Gentry was at the club that night with her husband, who was working as a deejay. At some point during the evening, Ms. Gentry saw a woman get into the driver's seat of Ms. Silvers' car. Ms. Gentry informed Ms. Silvers what she had seen.

Ms. Silvers went out to the parking lot but did not see anyone in her car. Ms. Silvers saw Appellant outside and recognized her as a patron of the club. Ms. Silvers asked Appellant if she had bothered her car. Appellant denied being inside Ms. Silvers's car. Ms. Silvers asked Appellant about the car a second time, and Appellant again denied tampering with or being inside the car.

Ms. Silvers told Appellant not to move. Ms. Silvers looked in her car and discovered that several CDs were missing and that her stereo had been removed from the dash. At that time, Ms. Silvers asked someone to call the police. Appellant informed Ms. Silvers that she would not talk to the police.

Tonya and Lloyd Johnson, the co-owners of the Starburst Club, came out into the parking lot to talk to Appellant. Appellant turned to walk away. Ms. Silvers asked Mr. Calhoun, who had accompanied Appellant to the club that night, not to let Appellant drive away. Mr. Calhoun and Appellant did not listen to Ms. Silvers. They continued to walk to Mr. Calhoun's car. Appellant got into the driver's seat. Ms. Silvers walked to the back of the car to get the license plate number. The car doors were still open when Appellant put the car in reverse, "gun[ned] it," and hit Ms. Silvers with the door. Ms. Silvers stated that the door knocked her down and caused her to have bruises and marks from gravel. As the car was driving away from the scene, Ms. Silvers noticed that the driver's side door would not close. According to Ms. Silvers, some of the items that were missing from her car fell out of Mr. Calhoun's car as Appellant was driving away.

Lloyd Johnson went out to the parking lot at the request of Ms. Gentry. When he arrived, he saw Appellant walking to her car. Ms. Silvers was arguing with Appellant, telling her not to leave the area. Mr. Johnson did not think that Appellant should be driving because he had seen her drinking inside the club, and he tried to take her keys. Appellant started backing out of the parking space while Mr. Johnson was standing in the open door of the car. Mr. Johnson was trapped by the door and had to push against it so that he would not be knocked down. Mr. Johnson was eventually able to get out of the way of the car as Appellant drove off.

Tonya Johnson also witnessed the events unfold from the parking area outside the club. Mrs. Johnson heard Ms. Silvers question Appellant about breaking into her car and then saw Appellant walk to another car and get into the driver's seat. Both of the doors of the car were open when Appellant started backing out of the parking space. According to Mrs. Johnson, Ms. Silvers was hit by the door on the passenger side of the car and Mr. Johnson was hit by the door on the driver's side.

Ms. Silvers filed a complaint against Appellant that was investigated by Detective Jeff Morgan of the Greene County Sheriff's Department. Ms. Silvers identified Appellant from a photographic lineup.

At trial, Appellant testified on her own behalf. According to Appellant, she arrived at the club sometime after 10:00 p.m. with her friend Mr. Calhoun. Appellant brought four Sparks beverages which were an energy-alcohol drink that contained more alcohol than beer. Appellant also split a couple of pitchers of beer with Mr. Calhoun. Appellant described herself as "buzzed" but stated that she was thinking clearly. She acknowledged that she probably should not have been driving.

Appellant testified that the incident started when someone at the club tried to kiss her and that one of her friends threw a cue ball at him. Appellant stated that she went outside after the incident. According to Appellant, she was outside for five or ten minutes when dozens of people came out of the club screaming at her, saying that they were going to kill her. Appellant testified that she was scared and jumped into her car. Mr. Johnson tried to grab her and pulled on the door of the car. She claimed that she was scared for her life but acknowledged that Mr. Johnson was probably trying to get the keys away from her at the time.

Appellant admitted that she started the car, backed out of the parking space, and drove to Johnson City, Tennessee. Appellant stated that the door was still open when she backed out but that Mr. Calhoun's door was closed. Appellant did not see Ms. Silvers lying on the ground when she pulled out of the parking lot.

Further, Appellant claimed that she did not burglarize Ms. Silvers's car and that she had no idea how the CDs got into the parking lot. Appellant also did not recall Ms. Silvers confronting her in the parking lot.

Appellant's mother, Judy Frye, testified that she was taking care of Appellant's children on the night of the incident. Ms. Frye heard about the incident on her police scanner and called Appellant. Ms. Frye described Appellant as scared and stated that she was crying. Appellant told Ms. Frye that a group of people told her that they were going to kill her. Ms. Frye could tell that Appellant had been drinking.

Mr. Calhoun also testified at trial.[1] According to Mr. Calhoun, he drove Appellant to the club where they split a couple of pitchers of beer. Mr. Calhoun also drank some liquor that he took into the bar with him that evening. Mr. Calhoun described himself as "lit up" and explained that he "had a good buzz."

Mr. Calhoun confirmed Appellant's statement that she went outside after one of their friends threw a pool ball at someone inside the bar. Mr. Calhoun walked outside shortly thereafter, where he saw Appellant talking to someone driving a Blazer. Mr. Calhoun then went to his car and got into the passenger seat. At some point, Mr. Calhoun went back inside to use the restroom. When he

[1]The transcript indicates that it was a joint trial. Mr. Calhoun was apparently indicted as an accessory after the fact.

returned to the car, four men and three women were outside yelling at Appellant and claiming that they were going to kill her.

At that point, Mr. Calhoun stated that Appellant got into the car. One of the men pulled on the door and tried to grab Appellant and the keys. At the same time, one of the women came to the passenger side of the car. She was "fussing" at Mr. Calhoun, trying to convince him not to let Appellant drive away. Mr. Calhoun testified that he closed his window and locked his door. After the man moved away from the driver's side of the car Appellant backed out of the parking space. Mr. Calhoun did not see Appellant hit anyone with the car. Mr. Calhoun stated that the CDs that were found in the parking lot probably belonged in his car.

At the conclusion of the jury trial, Appellant was found not guilty for the aggravated assault of Mr. Johnson and not guilty of burglary. The jury found Appellant guilty of simple assault in conjunction with Ms. Silvers. After a sentencing hearing, the trial court sentenced Appellant to eleven months and twenty-nine days for assault. The trial court ordered appellant to serve six months of the sentence on probation and six months of incarceration. After the denial of a motion for new trial, Appellant filed a timely notice of appeal.

Analysis

Sufficiency of the Evidence

On appeal, Appellant first complains that the evidence is insufficient to support her conviction for assault. Specifically, Appellant contends that she acted in self-defense to the "mob" of people in the parking lot outside the club. The State disagrees, arguing that the evidence supports the jury's determination that the evidence was sufficient for a conviction for assault.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the "State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact

from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trier of fact. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996).

A person commits assault who "intentionally, knowingly, or recklessly causes bodily injury to another" or "intentionally or knowingly causes another to reasonably fear imminent bodily injury." T.C.A. § 39-13-101(a)(1) - (2). Bodily injury can include cuts, abrasions, burns, or disfigurement as well as "physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." T.C.A. § 39-11-106(a)(2).

Reviewing the evidence at trial in the light most favorable to the State, the evidence established that Ms. Gentry saw someone inside Ms. Silvers's car. When Ms. Silvers was informed that someone was in her car, she went to the parking lot and saw Appellant. Ms. Silvers asked Appellant to stay in the area while the police were called. Appellant did not wait for the police; she got into Mr. Calhoun's car and quickly backed out of the parking space, hitting Ms. Silvers with the open passenger door. Ms. Silvers was knocked to the ground and her leg became bruised and swollen. The evidence supports the jury's verdict. The jury was presented with the testimony of Appellant, who claimed that she exited the area because she was scared of the mob of people. Further, the jury was instructed on self-defense. The jury obviously rejected Appellant's claims of self-defense by finding Appellant guilty of assault. As stated previously, the jury is entrusted with determining questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence. *Odom*, 928 S.W.2d at 23. It is within the prerogative of the jury to reject a claim of self-defense. *State v. Goode*, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997). Appellant is not entitled to relief on this issue.

Self-Defense Instruction

Next, Appellant complains that the trial court committed plain error by failing to instruct the jury with the most recent jury instruction on self-defense. Specifically, Appellant argues that her case "present[s] a case of first impression of whether one may be entitled to the presumption of self-defense - the presumption being the procedural device - under the newly enacted TCA 39-11-611 in trials held after the effective date of the statute for a crime allegedly committed prior to the effective date of the statute." The State Counters that Appellant has waived the issue for failing to present it in a motion for new trial and for failing to request the specific jury instruction or object when the self-defense instruction was read to the jury at trial. Furthermore, the State contends that the trial court did not commit plain error.

Appellant contends on appeal that because the statute on self-defense and the corresponding pattern jury instruction were amended on May 22, 2007, after the offense occurred, the trial court should have retroactively applied the new instruction to Appellant's offense. The record contains a written request for the jury instruction on self-defense that existed prior to the amendment as required by Tennessee Code Annotated section 40-18-110(c). Furthermore, it appears that the trial court instructed the jury on self-defense, using the Tennessee Pattern Jury Instruction that was in

effect at the time of the offense. Appellant now contends that the trial court committed plain error by failing to include the amended version of the instruction.

Appellant did not raise the trial court's failure to instruct the jury on what she perceives to be the proper instruction for self-defense in her motion for a new trial. Accordingly, we find that Appellant failed to preserve this issue for appeal pursuant to the Tennessee Rules of Appellate Procedure. *See* Tenn. R. App. P. 3(e), and 36(a).

We briefly consider whether it is appropriate to review the failure to charge the complained of defense under the doctrine of plain error. The doctrine of plain error provides that where necessary to do substantial justice, an appellate court may take notice of a "plain error" not raised at trial if it affected a substantial right of the defendant. Tenn. R. Crim. P. 52(b). In order to review an issue under the plain error doctrine, five factors must be present: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the defendant must have been adversely affected; (4) the accused must not have waived the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice. *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (adopting five factors set out in *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). As our supreme court stated in *State v. Page*, 184 S.W.3d 223 (Tenn. 2006), "An error would have to [be] especially egregious in nature, striking at the very heart of the fairness of the judicial proceeding, to rise to the level of plain error." *Page* at 231. Appellate courts are advised to use plain error sparingly in recognizing errors that have not been raised by the parties or have been waived due to a procedural default. *State v. Bledsoe*, 226 S.W.3d 349, 354 (Tenn. 2007).

Tennessee law does not mandate that any particular jury instructions be given so long as the trial court gives a complete charge on the applicable law. *State v. West*, 844 S.W.2d 144, 151 (Tenn. 1992). Accordingly, trial courts have the duty to give "a complete charge of the law applicable to the facts of the case." *State v. Davenport*, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (citing *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986)). As long as the instructions given are correct statements of the law and "fully and fairly set forth the applicable law," the trial court does not commit error in "refus[ing] to give a special instruction requested by a party." *State v. Bohanan*, 745 S.W.2d 892, 897 (Tenn. Crim. App. 1987).

The record reflects that the trial court's full instructions on self-defense tracked, almost word for word, the language of the pattern jury instruction applicable at the time of the offense. *See* T.C.A. § 39-11-611; T.P.I.-Crim. 40.06 (10th ed. 2006). We, therefore, agree with the State that the instructions contained a fair and accurate statement of the law. Further, Appellant has not shown that the trial court breached a clear and unequivocal rule of law. Specifically, Appellant has failed to show that the failure of the trial court to apply a pattern jury instruction adopted after Appellant committed the offense was plain error. We will not address this issue as plain error. This issue is waived.

Sentencing

Lastly, Appellant complains that the trial court erred by sentencing her to a sentence of eleven months and twenty-nine days with a fifty percent release eligibility. Specifically, Appellant's entire argument with regard to her sentence is that "2 mitigating and 2 enhancement factors applied, and that the sentence should have been imposed in the middle of the sentencing range, with a release eligibility date far lower than 50%." The State argues that Appellant has failed to show that the trial court erred or that she is entitled to a new hearing or a reduced sentence.

Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302, which provides in part that the trial court shall impose a specific sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. *See* T.C.A. § 40-35-302(b); *State v. Palmer*, 902 S.W.2d 391, 392 (Tenn. 1995). Misdemeanor sentencing is designed to provide the trial court with continuing jurisdiction and a great deal of flexibility. *See State v. Troutman*, 979 S.W.2d 271, 273 (Tenn. 1998); *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997). One convicted of a misdemeanor, unlike one convicted of a felony, is not entitled to a presumptive sentence.[2] *State v. Creasy*, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994).

In misdemeanor sentencing, a separate sentencing hearing is not mandatory, but the court is required to provide the defendant with a reasonable opportunity to be heard as to the length and manner of service of the sentence. T.C.A. § 40-35-302(a). The trial court retains the authority to place the defendant on probation either immediately or after a time of periodic or continuous confinement. T.C.A. § 40-35-302(e). In determining the percentage of the sentence to be served in actual confinement, the court must consider the principles of sentencing and the appropriate enhancement and mitigating factors, and the court must not impose such percentages arbitrarily. T.C.A. § 40-35-302(d).

In the case herein, the trial court conducted a separate sentencing hearing. At the hearing, the trial court determined that two enhancement factors and one mitigating factor applied. The trial court noted that Appellant, at the age of twenty-five, had a previous history of criminal convictions, including convictions for public intoxication, theft of property valued at less than $500, possession of marijuana, driving under the influence, violation of the financial responsibility law, evading arrest, and underage consumption of alcohol. *See* T.C.A. § 40-35-114(1). The trial court also considered Appellant's prior drug use and poor social history. The trial court further enhanced Appellant's sentenced based on her previous failure to comply with conditions of a sentence involving release into the community. *See* T.C.A. § 40-35-114(8). The record indicated that Appellant had violated the terms of probation on two prior occasions. Appellant had also violated the terms of diversion and served ten days in jail. In mitigation, the trial court determined that factor (11) applied, that

[2]We note that this Court has held that "[t]he Sixth Amendment concerns expressed in *Blakely v. Washington*, 542 U.S. 296 (2004)] are not implicated by [Tennessee's] misdemeanor sentencing scheme." *State v. Jeffery D. Hostetter*, No. M2003-02839-CCA-R3-CD, 2004 WL 3044895, at *9 (Tenn. Crim. App., at Nashville, Dec. 29, 2004), *perm. app. denied*, (Tenn. May 9, 2005).

"defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct." T.C.A. § 40-35-113(11). In support of the application of this factor, the trial court pointed out that the incident occurred within a matter of minutes and that Appellant was acquitted of burglary.

On appeal, Appellant seems to argue that the trial court should have applied mitigating factor (2), that she acted under "strong provocation," and factor (13), the catchall mitigating factor. T.C.A. § 40-35-113(2) & (13). The trial court rejected these factors, determining that Appellant was not provoked but was attempting to flee from the scene when she struck the victim with the car. Further, Appellant did not provide evidence at the sentencing hearing to support the application of the catchall mitigator based on the fact that she was pregnant at the time of sentencing, she had an alcohol problem, or that the club where the incident occurred was no longer open.

At the conclusion of the hearing, the trial court determined that Appellant's behavior justified a sentence of eleven months and twenty-nine days with a 50% release eligibility. The trial court made allowances for Appellant's pregnancy, ordering her to serve thirty days of the sentence immediately, then allowing Appellant to serve the remainder of the sentence one month after her child was born. After reviewing the evidence, we conclude that the trial court did not exceed the "wide latitude of flexibility" afforded in misdemeanor sentencing. Thus, we determine that ordering Appellant to serve an eleven month and twenty-nine day sentence with a 50% release eligibility is consistent with the principles of the sentencing act. This issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE